

REMARKS

Claims 1-27 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Kepplinger et al (US Pub. 2002/0192345) in view of Hunter (US Pat. No. 3,365,305).

The cited reference Kepplinger et al. discloses an aerated confection comprising sweeteners, fruit concentrate, an ionic hydrocolloid such as alginate, a calcium source, a cation source, an edible acid, and a whipping protein. As the Examiner admits there is no disclosure in Kepplinger et al. of the use of sodium hexametaphosphate. The aerated confection disclosed in Kepplinger et al. is completely unlike that disclosed in the present invention. Kepplinger et al. discloses that his aerated confection is gelled by the combination of the ionic hydrocolloids such as alginate with calcium, cations, and acids. In addition, Kepplinger et al. makes it clear that the whipping proteins are necessary to allow aeration into the gel formed by the alginate. Kepplinger et al. furthermore discloses in paragraph 0024 that when the aerated confection produced according to his disclosure is extruded onto a non-stick surface or a bed of a starch material and allowed to set it requires at least 90 minutes to fully firm the gel. It is only after the gel is firm that it can be cut into appropriate sized pieces and subsequently dried to produce a crisp, crunchy aerated cereal additive. Likewise in the examples disclosed in paragraphs 0027, 0030, 0032, and 0034 the aerated confection of Kepplinger et al. requires periods of time ranging from overnight to over thirty minutes at 150°F in order for the gel to firmly set. Again, this is completely unlike the present invention. The Examiner relies on Hunter US Pat No. 3,365,305 for its disclosure of use of sodium hexametaphosphate, which the Examiner suggests is utilized as a buffering agent in that reference. Hunter discloses an aerated confection comprising a dried comminuted emulsified edible lipid in combination with an alginate and a calcium for gelling the aerated confection. The gel system disclosed in Hunter like that of Kepplinger et al. uses

alginate and calcium for formation of the gel. The Examiner is directed to column 3, lines 60 through column 4, line 8 of Hunter wherein Hunter discusses the use of sodium hexametaphosphate in his system. Hunter states that the sodium hexametaphosphate will lead to gel inhibiting or gel retarding behavior in the system. Since Kepplinger et al. uses a similar gelling system one would expect a similar response would be achieved by adding sodium hexametaphosphate to the system of Kepplinger et al. as suggested by the Examiner.

This behavior on the gelling of the aerated confection disclosed in Kepplinger et al. and Hunter is just the opposite of that found in the present invention. As disclosed in the present invention in paragraph 0013 the hexametaphosphate is necessary in the present invention to allow the film-forming solution utilized in the present invention to firmly gel the final mallow mix to enable formation of an extrudeable mass that can be cut into discreet pieces as described in the noted paragraph. The use of the hexametaphosphate enables the extruded mass to be conveyed from the extruder to a cutter in a short time period such as from 2 to 6 minutes by which time the mass is fully gelled, firmly set and able to be cut as noted in paragraph 0015 of the present specification. As further noted in paragraph 0016 of the present specification the hexametaphosphate solution is necessary to permit the film-forming solution to sufficiently gel the mallow mix such that it can be cut by the cutter in a reasonable time frame. As noted, in the absence of hexametaphosphate the aerated confection takes a much longer time to firm and cannot be cut. Thus, if one were to follow the Examiner's suggestion and add the hexametaphosphate of Hunter to Kepplinger et al. instead of producing the present invention one would produce the invention of Kepplinger et al. with the difference that the aerated confection of Kepplinger et al. would then take even longer than overnight or at least 90 minutes to form into a gel. Thus, combining Hunter with Kepplinger et al. teaches away from the present

invention instead of toward it as suggested by the Examiner. In addition, the aerated confections disclosed in Kepplinger et al. and Hunter are completely different from those disclosed in the present invention. An additional difference between the present invention and the disclosure of Kepplinger et al. is that Kepplinger et al. says quite clearly in paragraph 0014 that the invention of Kepplinger et al. can utilize fruit juices in the formulation. Unlike the Examiner suggests Kepplinger et al. does not disclose fruit juices concentrated to a level of greater than 80% solids as required by the present invention. If the Examiner looks to paragraph 0014 of Kepplinger et al. it is clear that the 1-80% refers to the amount of fruit concentrate utilized in the formula not the amount of fruit solids in the fruit concentrate as required by claims 4, 17 and 33 of the present specification. Fruit juices unless highly concentrated as noted in claims 4, 17 and 33 cannot be utilized in the present invention because as disclosed in paragraph 0003 of the present specification fruit juices as used in the past have an acidity that hydrolyzes the sugars utilized in the present formulation leading to an unworkable aerated confection in the present invention.

Thus, because the combination of Kepplinger et al. and Hunter teaches away from the present invention the rejection of independent claims 1 and 14, and the claims which depend therefrom under 35 U.S.C. § 103 based on Kepplinger et al. and Hunter is improper and must be withdrawn. Independent claims 1 and 14 require that the hexametaphosphate enhance a rate of gelling of the aerated confection and as noted above the use of hexametaphosphate in the systems of Kepplinger et al. and Hunter would in fact lead to a reduction in the gelling of the aerated confections disclosed in those cited references.

Claims 28-45 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Kepplinger et al (US Pub. 2002/0192345) in view of Hunter (US Pat. No. 3,365,305 as to claims 1-27 and further in view of Zietlow et al. (US Pat. No. 6,432,460).

The rejection of independent claim 28 and the claims which depend therefrom based on Kepplinger et al., Hunter and Zietlow et al. is improper and should be withdrawn. As the Examiner notes Kepplinger et al. does not disclose the utilization of hexametaphosphate in formation of aerated confection or an aerated mallow mixture as recited in claim 28. As recited in claim 28 of the present invention the hexametaphosphate and the film forming agent are utilized to promote gelling of the mallow mixture. As discussed above the disclosures of Kepplinger et al. and Hunter when taken together would teach use of hexametaphosphate to slow the gelling of the systems disclosed in Kepplinger et al. and Hunter thus teaching away from the method disclosed in independent claim 28. The deficiency of the combination of Kepplinger et al. and Hunter is not relieved by the addition of Zietlow et al. Zietlow et al. likewise discloses no utilization of hexametaphosphate in formation of an aerated mallow mixture as required in independent claim 28. The combination of the three cited references would likewise not lead one of ordinary skill in the art to utilize a film forming agent in combination with hexametaphosphate to promote gelling of the mallow mixture for the reasons noted above. The cited references taken in combination in fact teach away from the present invention. Because independent claim 28 includes limitations not found in nor made obvious in view of the cited references taken alone or in combination the rejection of this claim, and the claims which depend therefrom, based on the cited references under 35 U.S.C. § 103 is improper and must be withdrawn.

Reconsideration of this application as amended is respectfully requested.

It is believed that this application now is in condition for allowance. Further and favorable action is requested.

The Patent Office is authorized to charge or refund any fee deficiency or excess to Deposit Account No. 04-1061.

Respectfully submitted,

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Date


Randall L. Shoemaker, Registration No. 43,118
DICKINSON WRIGHT PLLC
38525 Woodward Avenue, Ste. 2000
Bloomfield Hills, MI 48304-2970
248 433-7384